

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
ERDMAN, : Docket #1:20-cv-04162-
 : LGS-GWG
 :
 Plaintiff, :
 :
 - against - :
 :
 VICTOR, et al., : New York, New York
 : October 28, 2022
 :
 Defendants. :
 : TELEPHONE CONFERENCE
----- :

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

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THE CLERK: This is in the matter of Erdman vs. Victor et al, case number 20-cv-4162.

Starting with plaintiffs, please state your appearance for the record.

MR. TYLER ERDMAN: I'm plaintiff, Tyler Erdman.

MR. ALFRED J. POLIZZOTTO: For the defendants, Alfred Polizzotto, Polizzotto & Polizzotto, 6911 18th Avenue, Brooklyn, New York. Good afternoon, your Honor and everyone.

MR. EMILIO RODRIGUEZ: Also for the defendant, Emilio Rodriguez, Polizzotto & Polizzotto. Good afternoon, everyone.

HONORABLE GABRIEL W. GORENSTEIN (THE COURT): Okay, we're here based upon an application from the plaintiff, Docket 161 -- it's dated September 27th. It was a responsive letter (indiscernible).

I'm really concerned about what's going on in this case and whether the defendants are doing their job and taking it seriously. Let me just go back a little bit. I got a letter from the plaintiffs in July regarding a problem with responsiveness of documents. The defendants did not respond to the letter when they were supposed to. I had to issue an order in order to get them to respond. And when they responded, they

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PROCEEDINGS

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didn't even address it on the merits. It was very bizarre. But I took it that they were not opposing the letter. I ordered the relief the plaintiff requested in full. (Indiscernible) required them -- very specific searches that had to take place for documents up until the present date. It also required that the defendant provide a sworn statement detailing his efforts to contact any of the third parties.

The affidavit did not show up. The defendant never sought an extension. Mr. Erdman pointed out that the affidavit had not been filed; and in response there was a bizarrely accusatory letter from the defendants, acting as if it was totally normal to blow off a court-ordered deadline for the filing of an affidavit -- obviously, it isn't. I, nonetheless, granted the extension.

And then an affidavit was filed. And that's what we're going to talk about today. But I just wanted everyone to have the background. I required Mr. Polizzotto to be on this call because of my grave concerns about the way the defendants are litigating this case and whether they're doing what they should be doing in order to properly represent their client. They're on very thin ice right now. I don't know how

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PROCEEDINGS

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this is all going to turn out, but I'm very concerned about whether my order of July 26th has been complied with.

So we're going to break this into two parts. One is the part about whether there was a search of everything that I ordered. And then we're going to talk about the affidavit. So in terms of the search of -- whether things have been searched that I ordered, I think, unless I'm misreading it, the answer is no. They decided that whatever they'd done in the past in fact complied and that my order was a complete waste of time and they'd already done everything they were ever going to do. So my first question is was anything additional done for a search -- and anything you say here I'm probably going to have people put under oath eventually, so please be very careful to only say things you have personal knowledge of -- was anything done in response to my July 26th order in terms of the search, not in terms of the custodian -- meaning the third-party custodians -- but in terms of a search to comply with that order?

MR. RODRIGUEZ: I went to -- I spoke to my client about it, and he confirmed that any documents that were contained in those hard drives that we already

1 PROCEEDINGS 6

2 submitted to Mr. Erdman --

3 THE COURT: I actually asked a yes-or-no
4 question. It sounds like the answer is no, but you want
5 to give an explanation. Was any further search done for
6 responsive documents since July 26th.

7 MR. RODRIGUEZ: There was no further search
8 done --

9 THE COURT: It's a yes-or-no question --

10 MR. RODRIGUEZ: Yeah -- no.

11 THE COURT: -- so please try to answer it yes
12 or no; and then if you want to give an explanation, go
13 ahead.

14 MR. RODRIGUEZ: No, because for the reason that
15 I gave. So I'm going to have to say no; you're correct.

16 THE COURT: Okay. Well, I think it's rather
17 bizarre that the defendants would not have explained
18 that my order was a complete waste of time, would have
19 sought relief from it. I don't know that a party just
20 gets to say, "I think everything I've done is okay; I'm
21 not going to search any of this other stuff because I
22 don't think there's anything responsive. Because,
23 obviously, whatever search you did had been done years
24 ago. I asked for things to be searched up to the
25 present day, and I asked for that because you never

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PROCEEDINGS

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bothered opposing that relief. So I don't think you just get to say, "Well, you know, I don't think there's anything up to the present day because the events occurred in the past." Because people talk about events that happened in the past, even in the present day. Just because it happened in the past doesn't mean there aren't responsive documents. Your client could be talking about these alleged defamatory statements up until the present. So --

MR. RODRIGUEZ: Can I make --

THE COURT: -- explain this to me.

MR. RODRIGUEZ: I'm sorry. So when you're saying that we didn't oppose it, I felt that we did oppose it in the letter that we did submit. And if you say -- I mean, obviously, if you say that we didn't, you know, that's your conclusion. But we felt -- I felt that the letter that I sent, we did oppose it. But, you know, I was surprised to hear that we didn't, because we certainly did oppose it. But, like I said, it's your conclusion that we didn't, so it's -- you have to go by that.

THE COURT: Well, it's actually in the end not relevant, but since you brought it up, let me look at your letter again. Okay, it's at Docket 152. Tell me

1 PROCEEDINGS 8

2 where you address all of the issues he raises in his
3 letter. I'm looking at it right now.

4 MR. RODRIGUEZ: Okay. What is the date of that
5 letter so I can find it on my --

6 THE COURT: July 21st.

7 MR. RODRIGUEZ: The one July 21st, okay. I
8 apologize, bear with me. It's taking me an extra second
9 to call it up.

10 THE COURT: Mr. Polizzotto, are you able to
11 look at this letter?

12 MR. POLIZZOTTO: I'm pulling it up as we're
13 speaking right now and --

14 THE COURT: Docket 152.

15 MR. POLIZZOTTO: -- I see it now. I have it on
16 my screen.

17 THE COURT: Okay. So just to refresh your
18 recollection, Mr. Erdman sent a five-page letter saying
19 exactly what hard drives had to be searched, what the
20 problem was and why they should be searched up to the
21 present date. So I'd like to know where you oppose
22 conducting that search for documents up to the present
23 date in this letter.

24 THE CLERK: Emilio, I emailed you a copy in
25 case you haven't found it yet.

1 PROCEEDINGS 9

2 MR. RODRIGUEZ: What was that? I'm sorry, I
3 didn't hear --

4 THE CLERK: I emailed a copy of it to you, just
5 in case that helps.

6 MR. RODRIGUEZ: Oh, okay.

7 MR. POLIZZOTTO: And if I may, your Honor, the
8 opposition, if we're going to phrase it as such, is that
9 there may be a few hundred documents other than what had
10 already been produced. So implicit within there is that
11 there is nothing else that can be searched and/or
12 ascertained, but it is not stated as such.

13 THE COURT: I mean, Mr. Polizzotto, this is
14 outrageous. I mean, I don't know if you treat all
15 judges like this or just me. Do you have other cases?

16 MR. POLIZZOTTO: Yes, I have other cases,
17 including those in the Southern --

18 THE COURT: I mean, is this your conduct in
19 those other cases, too, to characterize a letter like
20 this as opposing relief?

21 MR. POLIZZOTTO: No, your Honor. I am merely
22 responding --

23 THE COURT: I mean, could you see the
24 problem -- Mr. Polizzotto, do you see the problem with
25 this letter in terms of how it's failed to oppose the

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PROCEEDINGS

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original relief?

MR. POLIZZOTTO: Yes, I do.

THE COURT: Okay. So, you know, the idea that Mr. Rodriguez, now in response to my question about what search was conducted, goes back to essentially an irrelevant point saying that there's something infirm about my order because he in fact opposed it is really outrageous.

MR. POLIZZOTTO: I understand your Honor's point.

THE COURT: I mean, I'm not sure what to do at this point except to have a hearing about what's really been going on for the last few months to put you, Mr. Rodriguez and Mr. Victor on the stand to see what efforts have been made to comply with my July 26th order, because I believe the conduct has been contemptuous. I'm not saying I'm going to hold you in contempt, but I'm running out of tools in the toolbox.

MR. POLIZZOTTO: I understand, your Honor. And I understand the lack of responsiveness, as you've put it; and I understand exactly what you're saying. I can say, even those it's inartfully missing -- I can't say "inartfully" -- but missing there, the search that had been undertaken was extensive. At the time that it was

1 PROCEEDINGS 11

2 done, it was all of the documents we had. Rather than
3 cull and try to select, we turned over everything in
4 accordance with the rules as best that we were able to.
5 We have done searches since then. However, in response
6 to your most recent order, no, the conversation with the
7 client indicated that there was nothing -- there were no
8 further sources that he had searched. And I understand
9 --

10 THE COURT: But what do you know about this
11 P-drive that's specifically mentioned? "P-drive, office
12 email accounts, any devices or cell phones."

13 MR. POLIZZOTTO: I'd have to ask Mr. Rodriguez;
14 he's the one who had the conversation with the client.

15 MR. RODRIGUEZ: From what my client told me,
16 everything that would have been on that drive was
17 already on those hard drives that were already
18 submitted. That's what he told me. I asked him about
19 that.

20 THE COURT: What have you done -- it's not
21 enough to just ask your client if a search was performed
22 correctly. One needs to dig more as a lawyer. And
23 there's certainly plenty of case law about this.

24 So I think what we have to do now is you have
25 to do a real investigation. I'm going to try starting

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PROCEEDINGS

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with an affidavit. If I don't like what I'm reading, I'm going to have a hearing. I want to know what has been done since July 26 specifically to comply with this order. If the answer is nothing, which I gather it is, then I want to know -- I guess -- I think this is what I want to do. I think I'm going to order you to show cause why you've not violated this order by doing the search that was ordered here for all documents up to the present day on all these various devices. I'll issue a written order that says that.

Now, you're going to really help yourself if in the meantime you try to do something to comply. And if you think the order is wrong, you can take a crack -- it's too late for reconsideration -- but I suppose you could take a crack under whatever standard it is under Rule 60(b). I'm going to require a memo of law on that. I'm not taking anything by letters anymore on this.

Go ahead. Someone was going to say something.

MR. ERDMAN: Oh, yeah, your Honor. This is plaintiff, Mr. Erdman. You were asking if they treat all cases like this, and they were --

THE COURT: No, no, I'm sorry, I don't want to ask you that question.

MR. ERDMAN: Oh, okay.

1 PROCEEDINGS 13

2 THE COURT: I just want to ask them that
3 question. I --

4 MR. ERDMAN: Oh, I know. This is very
5 habitual --

6 MR. RODRIGUEZ: As you know, your Honor, if
7 Mr. Erdman's going to say that, I'm going to turn around
8 and say no. This is very habitual in things that
9 happened before our particular firm came in. And so our
10 particular firm came in; that has not been habitual. If
11 he's going to go --

12 THE COURT: Well, I mean, the conduct in front
13 of me has been outrageous. I mean, also just the
14 failure of the defendants to recognize that when they
15 blow off court orders and blow off deadlines, that they
16 shouldn't be responsible for it. I just don't
17 understand that. You know, every now and then,
18 something personal happens, but that usually happens
19 once, and then someone else takes control. But to
20 happen literally over and over and over again, you know,
21 we've all been through personal matters. That's why we
22 have colleagues. We don't blow off court orders. We
23 don't take an accusatory attitude. The whole thing is
24 just a complete mystery to me as to why people think
25 they can get away with this. I just don't understand

1
2 it.

3 Let's figure out where we are now. In terms
4 of, you know, the search, I don't even know what this
5 previous search was; I don't know when it occurred.
6 What I do know is nothing has happened since then. I
7 don't know anything about the P-drive and office email
8 accounts and everything else. We need a detailed
9 affidavit of what was searched, since nothing has
10 happened since July 26th, and when it was searched. And
11 then -- I mean, unless someone tells me otherwise, you
12 have to comply with my order, which is you have to
13 search for documents since then up to the present day
14 that relate to the allegations in the Complaint.

15 Now, maybe that's prohibitively expensive or a
16 big problem, but you created this mess and you're going
17 to have to get yourselves out of it, which means if you
18 need to do a Rule 60(b) or some other motion or work
19 something out with Mr. Erdman, then you have to do that.
20 But, otherwise, you'd better do that search. I don't
21 see how you can just blow off a court order. If there's
22 some reason, you know, my order -- can someone explain
23 to me why, when the order says to do the search for
24 documents up to the present, you can just decide that
25 there are no documents up to the present without

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PROCEEDINGS

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searching for them?

MR. RODRIGUEZ: No.

THE COURT: Okay. I mean, if you know a particular database can't have something, you know, there's ways to do it; but you can't just say, "I'm not going to do it." You need to give an explanation. And the explanation -- and an explanation can't be the events happened before a certain date; therefore, there can't be any documents since that date. All we know is there aren't any contemporaneous documents; we don't know if there are documents, discussions with other people or anything else that happened after the date of the search.

THE COURT: All right. We're going to have to get -- and it will be in the context of the Order to Show Cause -- a full explanation of what was done, an explanation of why there shouldn't be a sanction for not having complied with the July 26th order. And let's at the same time provide a proper affidavit as to what's been going on with the third-party custodians. And the third-party custodians -- you know, I'm not going to say that this was contemptuous, but it's certainly not what I was looking for. You know, I'd like to know what dates happened, whether there was follow-up. There

1 PROCEEDINGS 16

2 certainly should be follow-up. I mean, if this is --
3 these are people who have documents that are in the
4 control of Mr. Victor, you don't just send an email into
5 the ether and say, "Oh, that's the end of it." There
6 has to be some kind of follow-up. You have to call, you
7 have to email, you have to find out what their response
8 is. And that all needs to be set out for me. That all
9 has to be explained. There's no dates on this.

10 So, you know, I'm not going to find you
11 violated my order, but it was certainly not what I
12 intended, so you're going to have to do it over again.
13 That's with respect to the third-party custodians. So
14 I'm going to give you a week to do all of this. And
15 then we're going to have to see where we are.

16 Now, in the meantime, I think you think you
17 should start conducting a search, unless you've got a
18 really good Rule 60 motion. Anyway, those are my
19 thoughts. I'm ready to hear from the defendants if
20 there's anything they want to add. And then I'll hear
21 from the plaintiffs.

22 MR. POLIZZOTTO: Well, your Honor, I believe
23 you've made your position clear, and I don't really
24 think there's anything to add.

25 THE COURT: Mr. Erdman, anything you want to

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PROCEEDINGS

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add?

MR. ERDMAN: Yeah. I believe their list of custodians is still omitting people. I believe I mentioned in my letter Brian Kennedy is one of them. He was an attorney that appears to have been hired specifically to approach law enforcement to make accusations that I was involved in some criminal activity. I believe Adams described that as being nearly his whole purpose. And it -- in other document responses and some other actions he said he also has responsive documents relating to me and law enforcement. But they --

THE COURT: Wait, wait, wait, wait, wait. I'm sorry, I lost you. Who said --

MR. ERDMAN: Well, Mister -- there was a document request made in another action to Mr. Victor, and those requests involved contacts (indiscernible) to law enforcement on Mr. Victor's behavior in regards to me and two other women that are suing him. And Mr. Victor answered by saying this attorney, Brian Kennedy, has those documents. And then in this case he's not mentioned at all nor have they contacted him.

MR. RODRIGUEZ: Well, that's easy. That's because in this case, Brian Kennedy was unmentioned in

1 PROCEEDINGS 18

2 your request for -- in your interrogatory --

3 THE COURT: No, don't talk to the other side.
4 Talk to me. I'm not interested in the other side, just
5 me.

6 MR. RODRIGUEZ: Well, okay, your Honor, look,
7 then I can say that the reason why Brian Kennedy wasn't
8 mentioned -- and I was actually talking to you, your
9 Honor. I'm sorry if I maybe misspoke a little bit, but
10 the reason for that is because in his interrogatories --
11 neither his interrogatories nor his request for
12 production of document was Brian Kennedy even mentioned.
13 So the fact that Brian Kennedy wasn't mentioned in some
14 other case, that's some other case. But Brian Kennedy
15 would have been mentioned in the sworn statement that we
16 submitted had he been part of the requests as we were
17 ordered to -- in the requests that were involved in this
18 case.

19 THE COURT: All right. Listen, Mr. Erdman, I
20 am relying right now on their responses as to who has
21 documents relevant to this. If you obtain competent
22 evidence, which is not what I have in front of me in
23 this letter, that the documents responsive to your
24 requests are in fact in the possession of another
25 individual, you should talk to the other side first.

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PROCEEDINGS

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And if you don't get what you need, then you should make an application that actually has competent testimony that some other individual has possession, custody of documents that are responsive to your requests. But I'm not going to make that ruling now.

MR. ERDMAN: Understood. Would I be able to have permission to file that under seal? It goes into some deposition transcripts that I don't believe we got the (indiscernible) from to release publicly. Would you like me to make an application for that?

THE COURT: I haven't a rule about filing things under seal. I mean, certainly, you have to serve the other side; but you can make the application, and I'll decide then.

MR. ERDMAN: Understood.

THE COURT: I mean, I would not suggest-- if there's something that's sealed in another case, that doesn't mean you can file it in my case. So you may have to talk to the people in the other case. There's no --

MR. ERDMAN: Oh, yes, I know. I mean specifically --

THE COURT: -- there's no blanket --

MR. ERDMAN: -- deposition.

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PROCEEDINGS

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THE COURT: I understand that. But if there's a deposition that's subject to a protective order -- is the deposition taken in some other case or in this case?

MR. ERDMAN: No, in this case.

THE COURT: Oh, in this case. Oh, well, then that's a different question. But you meant another case?

MR. ERDMAN: I'll try and work it out with the party that has an interest in that.

THE COURT: All right. Let's see, I think -- yes, so what did I say, a week? Today is the 28th. So we're talking November 4th. So if there's a problem, Mr. Erdman, with what you get and what's going on, just, you know, talk with the other side and write me immediately. Okay?

Anything else we need to do today on this from the plaintiff's point of view?

MR. ERDMAN: There are still issues with the priv log. I can make an application on that. It's just deficient with things like Mr. Victor would send documents which would appear responsive to this attorneys and then claim they're privileged because they were attached to a privileged email. And now he's claiming those attorneys are the only ones with the

1 PROCEEDINGS 21

2 documents. So it doesn't really seem to make much
3 sense, among some other issues that have not been
4 resolved with the log.

5 THE COURT: Yes, I meant on what's raised here.

6 MR. ERDMAN: Oh, okay. No, I think this covers
7 it. Thank you.

8 THE COURT: Anything else from defendants?

9 MR. ERDMAN: No, thank you.

10 THE COURT: Okay. Thank you, everyone. Good-
11 bye.

12 (Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Erdman v. Victor et al, Docket #20-cv-04162-LGS-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: October 31, 2022